SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1968

No. 1167

ATHALIE IRVINE SMITH,

Petitioner,

vs.

THE JAMES IRVINE FOUNDATION, a corporation, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF OF PETITIONER ATHALIE IRVINE SMITH TO BRIEF OF RESPONDENTS THE JAMES IRVINE FOUNDATION, ET AL., IN OPPOSITION TO PETITION

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I

The 4,000 pages of oral testimony and the 297 documents received in evidence referred to by the respondent Foundation at page 9 of its brief were made up of about seventy percent of the oral testimony and about ninety percent of the documentary exhibits that were introduced by respondent Foundation to support its affirmative

defenses that the petitioner's action was barred by the statute of limitations, res judicata, laches and estoppel. The Court is further advised that the reason for the size of the reporter's transcript in this case was because the proceeding in the District Court was a deposition hearing under the judicial supervision of Honorable Henry N. Graven, Senior District Judge from the Northern District of Iowa, by assignment. The proceeding before Judge Graven was not a formal trial where the rules of evidence were applied. There never was a trial, as the case was submitted on the depositions for the decision of Judge Graven on the sole issue of whether or not the trust was valid or void. The Memorandum and Decision of the District Court Judge expressly stated that the affirmative defenses of the respondent Foundation, based on the statute of limitations, res judicata, laches and estoppel, were not before the Court for its decision and therefore were not considered.

In order to pinpoint the crucial findings of the District Court which are clearly erroneous when considered in the light of the substantial documentary evidence in the case, the petitioner will refer in this Reply Brief to the brief of the respondent Foundation to said findings in the order in which they appear in the Memorandum and Decision of the District Court, which commenced at page 88 of the Petition as follows:

[1] "The first issue for determination is the issue as to the delivery of the Indenture. The signed acceptance of the Foundation of the trusteeship established by the Indenture appears on the Indenture. The Indenture was

not found in the safety deposit boxes of James Irvine following his death. There is lacking any evidence showing possession of the Indenture by James Irvine following its execution. The only possession of it following its execution, as shown by the evidence, was the possession of the Foundation shortly following his death."

There was no evidence, either oral or documentary, introduced by the respondent Foundation which established the physical delivery, as required by law, of the Indenture by James Irvine to any person or entity, including Myford Irvine or E. M. Price. O'Branovich v. Stiller, 34 Cal. Rptr. 923. The finding of the District Court that the signed acceptance by the Foundation of the trusteeship established by the Indenture appears on the Indenture is clearly erroneous. The only signatures on the Indenture are those of James Irvine, the trustor, and his son and employee and agent, Myford Irvine, who held the office of president of the Foundation, as the employee and agent of his father and who at all times, both before and after February 24, 1937, until the death of his father on August 24, 1947, was in the exclusive employ of his father as a clerk in his father's office. He acted as the "tool" and "dummy" for his father as the president of his father's corporation, known as The James Irvine Foundation. The third signature on the Indenture was that of E. M. Price, who, like Myford Irvine, was in the exclusive employ of James Irvine from 1917 and until his death on August 24, 1947, as his stenographer and secretary. Miss Price, like Myford Irvine, was placed by her employer, James Irvine, in the office of secretary of the respondent Foundation to act as his "tool" and

"dummy" in said office, and she, like Myford Irvine, was under the absolute control and domination of her employer, James Irvine, and had no independent identity or freedom from the control and domination of James Irvine as her employer in the performance of any duties as secretary of the Foundation.

The respondent Foundation makes no effort in its brief to either deny or to attempt to explain any exception to the law that is applicable to the employer-employee and principal and agent relationship between James Irvine, as the employer and principal, and Myford Irvine and E. M. Price, as his employees and agents. It therefore follows that from this admitted relationship of principal and agent, the District Court should have made a finding as a matter of law that the possession of the Indenture and/or the Irvine stock by Myford Irvine or E. M. Price constituted his or her possession thereof as the employees and agents of their employer, James Irvine, and that their possession therefore was, as a matter of law, the possession of their employer and principal, James Irvine. The closing sentence of the above finding by the District Court states that the only possession of the Indenture following its execution, as shown by the evidence, was the possession of the Foundation shortly following the death of James Irvine. Under this finding by the Court, the burden of establishing the actual physical delivery of the Indenture during the lifetime of James Irvine rested on the respondent Foundation, and it failed to do so. The evidence referred to in this finding is that on September 19, 1947, there was a special meeting of the board of directors of The James Irvine Foundation and the minutes of this

meeting, Exhibit A-14, contain a statement that the Indenture was read by Miss Price to the board of directors. On September 19, 1947, E. M. Price, who was employed by James Irvine during his lifetime as his stenographer and secretary, was employed following the death of James Irvine by the executors of the Estate of James Irvine, deceased, as their secretary, as shown by Appendix I, pp. 136 to 139, inclusive, of the Petition. In connection with this finding, the District Court made the further finding that the petitioner had failed to establish the nondelivery of the Indenture and that the evidence preponderates in favor of a finding that the Indenture was, following its execution, delivered to the Foundation by James Irvine and it was thereafter retained by it. This latter finding conflicts with the other finding by the District Court that there was no evidence in the record showing possession of the Indenture following its execution except the evidence of the meeting of the directors of the Foundation shortly following the death of James Irvine when Miss Price read the Indenture to the assembled directors.

It is therefore clear from the only evidence in the case that James Irvine did not, by any act on his part that is disclosed by the record, actually make a physical delivery of the Indenture during his lifetime to any person or entity. Furthermore, the Court was in error in holding that the burden of proving the nondelivery of the Indenture rested with the petitioner. Lawson v. Lowengard, 59 Cal.Rptr. 186; Blonde v. Jenkins, 131 Cal.App.2d 682, 281 P.2d 14.

[2] The next finding of the District Court, which appears at page 90 of the Petition, is to the effect that the petitioner had failed to establish the nondelivery of the certificates of the Irvine stock and this finding is likewise an error of law, as the burden was on the Foundation to show such delivery by the preponderance of the evidence. As heretofore stated, the only evidence in the case concerning the delivery of the Irvine stock consisted of the testimony of N. Loyall McLaren and Robert H. Gerdes. Mr. McLaren was president of the Foundation at the time of the deposition hearing, and both Mr. McLaren and Mr. Gerdes at said time were also directors and trustees of the Foundation. Both of these parties testified that during the lifetime of James Irvine, he had stated to them that he had delivered the Irvine stock to Myford Irvine and E. M. Price. There is no evidence that Mr. Irvine ever told either Mr. McLaren or Mr. Gerdes that he had delivered the Irvine stock to The James Irvine Foundation as trustee. As heretofore pointed out, this evidence did not support a finding of the legal delivery of the Irvine stock or the Indenture to the trustee during the lifetime of James Irvine for the reason that the said Myford Irvine and E. M. Price at the time of said delivery, were the exclusive employees and agents of James Irvine, who held absolute control and dominion over his said employees and agents in their respective simulated offices of president and secretary of the Foundation. No attempt is made by the respondent Foundation in its brief to refute the relationship of employer and employee and master and servant between James Irvine and Myford Irvine and E. M. Price which is connected with the

delivery of the Irvine stock. This finding of the District Court of the delivery of the Irvine stock to the Foundation as trustee, based upon the only evidence in the case that such delivery was made to Myford Irvine and E. M. Price under the circumstances hereinabove set forth, is clearly erroneous.

[3] The next finding made by the District Court involves the interpretation of paragraph 2 of the Indenture, which paragraph permits the trustee to use all or any part of the income of the trust for private purposes through the guise or device of investing such income in a private institution, such as a private school or any other private and noncharitable entity. Appendix Q, pp. 173-175, of the Petition. The applicable law to this noncharitable provision that is contained in the Indenture is set forth in the Petition at pages 33 to 35, inclusive, and the argument of the respondent Foundation in its brief does not change either the application of the authorities cited by the petitioner or the interpretation of this noncharitable provision, which is an inherent and inextricable part of the Indenture and which renders the entire trust void.

The statement in the brief of the respondent Foundation that this investment provision only amounts to a power that is vested in the trustee to accumulate the income from the noncharitable trust corpus, to wit, the Irvine stock, for investment purposes is not true, as said paragraph 2 of the Indenture expressly states that the Foundation as trustee may each year set aside such sum from the income received as the board of directors of the trustee in its sole discretion deems wise and expedient for investment, and said trustee shall each year invest the

same in accordance with subparagraph 3 of the Indenture, which said unrestricted investments, when made, shall become a part of the noncharitable corpus or principal of the trust property. It is therefore apparent that this is not a power which is vested in the trustee to accumulate income for investment purposes, for once the income is so used, the investments become part of the corpus of the trust and lose their identities as charitable income forever. The question involved here is not how the present trustees of the respondent Foundation have administered the trust or whether or not they have devoted any of the trust income to noncharitable uses. The question of law that is involved and which is fatal to the validity of the trust is whether or not the trustees under this noncharitable provision have the power to devote any part of the trust income to a noncharitable or private purpose, and it is immaterial whether or not the present board of trustees has exercised this power. This income trust is in perpetuity, and another board of trustees which succeeds the present board in the future may decide to exercise said power to devote a part or all of the trust income to a noncharitable purpose under the guise of making an investment, and it is this power to do so that renders the entire trust void.

[4] The next finding that was made by the District Court on the merits of the issues involved in the deposition hearing was that the trust was not an agency and that it was not an attempted testamentary disposition by the trustor, James Irvine. This finding by the Court is completely overruled by the documentary evidence introduced by both the petitioner and the respondent Foundation, which was completely disregarded by the District Court.

Neither is any of this documentary evidence referred to by the respondent Foundation in its brief, although a number of the documentary exhibits introduced at the deposition hearing and which constituted the substantial evidence, are set forth in the Appendix to the Petition. This documentary evidence is irrefutable by the respondent Foundation, as practically all of it came from the files of the respondent Foundation or The Irvine Company, which is controlled by the respondent Foundation. The District Court in its Memorandum informally refers to some of this documentary evidence but makes no direct connection therewith in any of its findings. The District Court refers to the income tax returns of The Irvine Company during the period from 1936 to 1947, which covers the lifetime period of James Irvine subsequent to the date of the Indenture, to wit, February 24, 1937. Each of the Federal and State of California Income Tax Returns of The Irvine Company, Exhibit 3, contained a schedule which disclosed that James Irvine was the president of The Irvine Company, that he received a salary of $12,000 per year and that he owned 547 shares of the stock of The Irvine Company. The District Court in its Memorandum stated that this schedule did not mean what it stated, to wit, that James Irvine owned 547 shares of the stock of The Irvine Company, although the income tax returns were signed either by James Irvine, as president of The Irvine Company, or some other officer of said corporation under the penalty of perjury. No mention, however, is made by the District Court of the additional documentary evidence which is set forth in each of the said Federal and State of California Income

Tax Returns during said eleven-year period and which is the endorsement that is typed on the balance sheets that are attached to each of said income tax returns during said eleven-year period, which states:

> "Ownership of Company stock. James Irvine owns 547 shares out of a total of 1,000 shares outstanding. This stock was acquired in 1894 and his return is filed in San Francisco, where he resides."

No attempt is made by the respondent Foundation in its brief to explain or detract from the conclusive significance of this statement of ownership of 547 shares of Irvine stock by James Irvine, which appears on said balance sheets. The 510 shares of Irvine stock that are described in the Indenture are a part of and are included in this 547 shares of Irvine stock, and this documentary evidence certainly established that the finding by the District Court that the Irvine trust was not testamentary is clearly erroneous.

The brief of the respondent Foundation does not attempt to explain the documentary evidence which is set forth in the Petition at pages 153 to 163, inclusive, as Appendix N and which is a verbatim duplication of the stockholders certificate records of The Irvine Company. This documentary evidence established the contention of the petitioner that James Irvine had the physical possession of Certificates Nos. 33 and 42 for 173 shares of Irvine stock on April 21, 1941. The respondent Foundation contended that said certificates had been delivered to Myford Irvine and E. M. Price in 1937. With reference to this contention of the petitioner, the District Court

stated in its Memorandum that the record was silent as to the facts and circumstances that surrounded the possession of these two certificates of Irvine stock by James Irvine on April 21, 1941. However, the superior documentary evidence established through the stockholders certificate records of The Irvine Company that, contrary to the finding of the District Court, these two certificates were actually in the physical possession of James Irvine on April 21, 1941 and were surrendered by him to The Irvine Company on the same date, to wit April 21, 1941, and seven new certificates of Irvine Company stock under different certificate numbers and in different denominations were issued to James Irvine and in his name and signed by him as the president of The Irvine Company, as shown by the check marks which have been made before and after the name "James Irvine" in Appendix N at pages 156, 158, 159 and 161 of the Petition. This documentary evidence from the records of The Irvine Company demonstrates that the finding of the District Court to the contrary is clearly erroneous.

II

In connection with the findings of the District Court which held that the trust was not testamentary and was not a mere agency as contended by the petitioner, the District Court further stated as follows:

> "The contention of the Plaintiff as to the matter of agency is closely connected with the matter of testamentary disposition. If during his lifetime the relationship of James Irvine and the Foundation as to the shares was that of principal and agent,

that relationship would, of course, have been terminated by his death. If the relationship was that of agency, then no valid trust was established as to the shares and James Irvine continued to be the owner of them for testamentary purposes; and the disposition by him under the Indenture of Trust would have been testamentary in character."

The foregoing statement of the law of agency that is applicable to the substantial documentary evidence introduced by the petitioner in this case is correct, but the District Court did not follow its statement of the law of agency and the attempted testamentary disposition by James Irvine of the Irvine stock to the uncontradicted evidence in the case, which clearly established that Myford Irvine and E. M. Price, who are the only persons involved to whom the delivery of the Irvine stock or the Indenture was made, were the employees and agents of the trustor, James Irvine, and therefore the principle of the law of agency applied to this relationship and the District Court should have applied the law as stated by the District Court to the undisputed evidence in the case and rendered judgment against the respondent Foundation and in favor of the petitioner, who was the plaintiff in the District Court.

III

As hereinabove mentioned, there was no formal trial of the case in the District Court. The proceeding conducted before the District Court from May 1 to May 17, 1967 was a deposition hearing under the judicial supervision of Honorable Henry N. Graven, Retired Senior Judge from the Northern District of Iowa. Because there

was no formal trial in the case at any time, the rules of evidence which would control a trial were not invoked. At the conclusion of the deposition hearing, the case was submitted to Judge Graven on the depositions, and the sixteen volumes of the reporter's transcript on file herein constituted the depositions of the respective witnesses who were examined by counsel for the parties.

The foregoing situation is brought to the attention of this Court for the reason that the same discloses the informality in which the record in this case was made.

When the case reached the United States Court of Appeals for the Ninth Circuit upon the Notice of Appeal filed by the petitioner, as the appellant, the Honorable Richard H. Chambers, Chief Judge of the United States Court of Appeals for the Ninth Circuit, disqualified all of the members of said Court from hearing the appeal, the same as he had previously disqualified all of the District Court judges in the Ninth Circuit from hearing the case in the District Court. The apparent basis for this disqualification order by Chief Judge Chambers was the fact that Chief Judge Thurmond Clarke of the United States District Court for the Central District of California is the stepfather of the petitioner. This disqualification order, although unprecedented in any other case that is known to counsel for the petitioner, resulted in the assignment of three senior retired judges from outside the Ninth Circuit and from three separate Circuit Courts of Appeals to hear the petitioner's appeal. On August 27, 1968, these three judges came to San Francisco, California, and heard the arguments of counsel for the respective parties

in said appeal and subsequently issued their decision, which affirmed the judgment of the District Court. As aforesaid, these three judges were from three separate and distinct Circuit Courts of Appeals as follows: Hon. John C. Pickett, Retired Senior Judge from the Tenth Circuit Court of Appeals; Hon. Austin L. Staley, Retired Senior Judge from the Third Circuit Court of Appeals; and Hon. Warren L. Jones, Retired Senior Judge from the Fifth Circuit Court of Appeals.

It is the contention of the petitioner, Athalie Irvine Smith, that these three Court of Appeals judges, coming from three different circuits, did not constitute either a Constitutional or a statutory Court of Appeals. Rule 35, Rules of Appellate Procedure, provides that a majority of the circuit judges who are in regular active service may order that an appeal or other proceeding be heard or reheard by the Court of Appeals in banc and that a party may suggest the appropriateness of a hearing or a rehearing in banc. In the event such a request for a hearing or a rehearing is made by a party, Rule 35 further provides that the clerk shall transmit any suggestion to the judges of the court who are in regular active service, but a vote will not be taken to determine whether the cause should be heard or reheard in banc unless a judge in regular active service or a judge who was a member of the panel that rendered a decision sought to be reheard requests a vote on such a suggestion made by a party.

Petitioner therefore contends that in view of the order of Chief Judge Chambers which disqualified every active member of the Court of Appeals for the Ninth Circuit

from entertaining an appropriate motion for an order that the appeal of petitioner, Athalie Irvine Smith, should be heard or reheard by the active judges of the Court of Appeals for the Ninth Circuit in banc, constituted a denial of petitioner's Constitutional right to procedural due process and also of her Constitutional right to have her day in court and to due process of law, as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution.

Petitioner was also precluded by reason of said disqualification order of Chief Judge Chambers of the Ninth Circuit Court of Appeals from exercising her right to make a motion in some other Court of Appeals in another circuit than the Ninth Circuit, that her appeal be heard or reheard in banc by any other Court of Appeals among the ten Circuit Courts of Appeals that make up the appellate judiciary system of the federal courts, for the reason that each of the three judges on the panel that heard and decided her appeal were from three different circuits and not one of the Courts of Appeals in the Tenth, Third or Fifth Circuits had any jurisdiction to entertain a hearing of said appeal or a rehearing thereof in banc, and petitioner was therefore denied her Constitutional right to procedural due process and her Constitutional right to have her day in court and to due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution.

On April 7, 1969, petitioner's counsel wrote a letter to Messrs. McCutchen, Black, Verleger & Shea, attorneys of record for the respondent Foundation, and sent a copy

thereof to each of the counsel of record for the other respondents in the case and to John F. Davis, Esq., Clerk, Supreme Court of the United States. In this letter counsel for the respondents were advised that this additional matter concerning a denial to the petitioner of due process of law and procedural due process would be presented to the Supreme Court in the petitioner's Reply Brief to the brief or briefs of the respondents.

IV

James Myford Irvine is both a lineal descendent, issue and an heir of his grandfather, James Irvine, and also a beneficiary under the last Will and Testament of his grandfather. The California authorities cited by the petitioner at pages 116 to 118, inclusive, of her petition correctly set forth the California law that is applicable to the status of James Myford Irvine as a descendant, issue and heir of his grandfather. None of these authorities are challenged in the brief of the respondent Foundation, and particularly Section 250 of the California Probate Code, which provides that James Myford Irvine is substituted in the place of his father, who died in 1959, to the right to inherit from his grandfather, together with his sister, Linda Irvine Gaede, the same share or right in the estate of his grandfather that his father, Myford Irvine, would have taken as an heir if living. Appendix E, pp. 116-118, of the Petition. There can be no difference concerning the rights of James Myford Irvine to inherit from his grandfather than the rights of his sister, Linda Irvine Gaede. The statement at page 14 of respondent's brief that the respondent Linda Irvine Gaede was not joined

in the action on the Motion of the Foundation as an heir at law of James Irvine but solely as a beneficiary of the residue of her grandfather's estate under the terms of his Will is contradicted by the record that was made by the respondent Foundation in the District Court. The respondent Foundation made a Motion to join Linda Irvine Gaede as an indispensable party to the petitioner's action, and in support of said Motion an Affidavit was filed by Howard J. Privett, as counsel for the Foundation, and in said affidavit the affiant, Howard J. Privett, unequivocally stated: "That the records, pleadings and files herein disclose that Linda Irvine Gaede is an heir at law of James Irvine, deceased, and a beneficiary of the Estate of James Irvine, Deceased." Appendix A, infra p. 8. The facts concerning the relationship of Linda Irvine Gaede as related in the Affidavit of the Foundation's counsel, Howard J. Privett, under oath, and based upon the further factual statement that said relationship as an heir appeared from the records, pleadings and files in the action, cannot at this late date be countermanded by the unsworn and incorrect statement that appears on page 14 of the respondent Foundation's brief to the contrary. Furthermore, the facts in the case as disclosed by the record are indisputable, and under these facts and the law in California, both Linda Irvine Gaede and her brother, James Myford Irvine, are entitled to share the interest that their father, Myford Irvine, would receive, if living, in the event the Irvine inter vivos trust is held to be void.

James Myford Irvine also, like his sister, Linda Irvine Gaede, is named as a beneficiary under the Will of his grandfather, James Irvine. This Will was introduced in

evidence by the respondent Foundation as Exhibit B. Under Article Fifth, Paragraph A, of said Will, James Irvine made provision for his widow. During the probate of the Will and in the year 1950 before the Estate of James Irvine had been distributed, the widow died. Her interest in the Will was thereupon distributed under Paragraph A of Article Fifth to Kate Lillard Wheeler and Linda Jane Irvine by adding to the trust estates of said granddaughters one-half of the trust estate provided for the widow. Paragraph B of Article Fifth of the Will provides that three-eights of the residuary estate is devised in trust for Kate Lillard Wheeler and further provides that in the event that Kate Lillard Wheeler dies leaving no issue, her estate shall be distributed to Athalie Anita Irvine, the petitioner herein, and to Linda Jane Irvine; and that if either Athalie Anita Irvine or Linda Jane Irvine die without issue before Kate Lillard Wheeler dies leaving no issue, the shares of Athalie Anita Irvine and Linda Jane Irvine shall be paid over, absolutely, to Myford Irvine, as the son of the testator, James Irvine, or in the event of the death of Myford Irvine, then to his issue, by right of representation.

The foregoing provision, which relates to James Myford Irvine as issue of Myford Irvine, is repeated in Paragraphs C and D of Article Fifth of the Will. Paragraph C is for the benefit of the petitioner and Paragraph D is for the benefit of Linda Irvine Gaede.

It is therefore apparent from the Will of James Irvine that James Myford Irvine is a testamentary beneficiary under Paragraphs B, C and D of Article Fifth of said Will.

James Myford Irvine is also a testamentary beneficiary of the Will of James Irvine under Article Fifth, Paragraph F, which provides in subparagraph 2 as follows: "If any of my residuary estate remains in the hands of my trustees after making distribution of my estate in accordance with the provisions of this Will, such remaining estate shall be paid over, in equal shares, to my then surviving issue, by right of representation." In view of the foregoing provisions which are set forth in the Last Will and Testament of James Irvine, it is futile for the respondent Foundation to represent to this Court that the said minor grandson of the decedent, James Irvine, is not a named testamentary beneficiary in the Last Will and Testament of his grandfather. Linda Irvine Gaede and James Myford Irvine, who stand in the identical relationship as heirs, descendants and issue and testamentary beneficiaries of their grandfather, James Irvine, are both indispensable parties to the action, and the failure to join the minor, James Myford Irvine, as an indispensable party to this action and to foreclose his Constitutional rights to have his day in court and due process of law as such indispensable party, cannot be either logically or legally supported by the respondent Foundation.

The respondent Foundation contends that James Irvine did not die intestate by reason of the residuary clause that is contained in his Will. The petitioner contends, however, that the residuary clause of said Will, as set forth in subparagraph 2 of Paragraph F, Article Fifth, constitutes the residuary estate of said Will in the event that petitioner prevails in her action to have the inter vivos trust declared void. The Estate of James Irvine was distributed by the

executors thereof to the testamentary trustees in 1952, and if judgment is entered for the petitioner and the 459 shares of Irvine stock become an asset of the estate of James Irvine, then James Myford Irvine, as one of the surviving issue of his grandfather, James Irvine, is entitled to his share of said 459 shares of Irvine stock.

The issue raised by the complaint of the petitioner to the effect that James Irvine died intestate as to the 510 shares of Irvine stock (now 459 shares) was never litigated in the District Court, and no finding on this issue was made by the District Court. It was the contention of the petitioner in her Petition for Rehearing filed with the Court of Appeals and denied by said Court, that the substantial evidence introduced at the deposition hearing disclosed that James Irvine died intestate as to the 510 shares of the Irvine stock and therefore that the petitioner and the other heirs at law of James Irvine would be entitled to the distribution of the Irvine stock as such heirs and that the same would not come under the trust provisions of the Will of James Irvine, deceased. However, none of these issues were considered by the District Court, and as above stated, no finding thereon was made by the District Court. This issue therefore is still open. The record in this case clearly discloses that in the event the inter vivos trust is held to be void, the 510 shares (now 459 shares) of Irvine stock would not come under the trust provisions of the Will of James Irvine, deceased.

V

The entire corporation officer staff of the Foundation trustee consisted of the full time office employees and

agents of James Irvine, during the ten-year period that represented the life of James Irvine subsequent to the date of the Indenture, to wit, February 24, 1937. They were Myford Irvine, his office clerk and his "dummy" president; Paul A. Dinsmore, another office clerk as his "dummy" vice president; and E. M. Price, his "faithful" stenographer and secretary, as his "dummy" secretary and treasurer. Each of these employees and agents were on the personal payroll of James Irvine for any duties that were rendered by them during said ten-year period, including the services, if any, that they performed for him as his "dummy" officers of the Foundation trustee. They received no compensation from the Foundation trustee. Appendix I, pp. 136-139, inclusive, of the Petition. Exhibits A-76 and A-77.

Under these circumstances the possession of either the Indenture or the Irvine stock during said ten-year period by Myford Irvine or E. M. Price, as the undisputed employees and agents of James Irvine, and no one else, and regardless of their "dummy" titles, as president and secretary-treasurer of the Foundation trustee, would be the possession of their employer and principal, James Irvine, as a matter of law. *Monell v. College of Physicians and Surgeons,* 198 Cal. App. 2d 38, 17 Cal. Rptr. 744; pp. 123-125 of the Petition. *Lawson v. Lowengart,* 251 ACA 98, 59 Cal. Rptr 184; pp. 125-129 of the Petition.

Trustors of charitable trusts, such as James Irvine, are recipients from the United States Government of extraordinary special tax exemption privileges and immunities which are not enjoyed by the ordinary taxpayer citizen. By reason of this grant of special privilege, the recipient

who thereby avoids the payment of estate taxes on his charitable trust is required to create and execute the trust in strict compliance with the law, the same as a testator who must execute his Will in accordance with strict legal formalities. The Estate of James Irvine, Deceased, avoided the payment of estate taxes to the United States Government in the sum of more than $3,000,000 by reason of the alleged charitable trust of James Irvine, which involved 510 shares of the stock of The Irvine Company.

The first basic legal requirement that is connected with the creation of a valid inter vivos trust is stated in the case of Edwards v. Guaranty Trust, etc. Bank, 47 Cal.App. 86, 89, 190 P. 57, 59, as follows:

> "To constitute a valid gift inter vivos, the purpose of the donor to make the gift must be clearly and satisfactorily established, and the gift must be complete by actual constructive or symbolical delivery, without power of revocation. 20 SYC 1193. In order to accomplish this, 'there must be a parting by the donor with all present and future legal power and dominion over the property.' "

Whether the delivery is actual or symbolic, there is no valid gift of personal property unless the donor becomes divested of all control. As said in Estate of Alberts, 38 Cal.App.2d 42, 47, 100 P.2d 538:

> "Complete divestment of all control by the donor is a necessary essential to constitute a valid gift of personal property. [13 Cal. Jur. 32, Sec. 1.] This is true regardless of whether the delivery of the property is actual or symbolic."

Under the above-stated mandate of the law involving the essential requirements to constitute the legal delivery of the trust property, there must be complete relinquishment from any present or future control by the trustor thereover.

Because of the relationship of master and servant and principal and agent between James Irvine, as master and principal, and Myford Irvine and E. M. Price, as servants and agents, James Irvine had the legal power to revoke the delivery at any time and to recall the Indenture and the Irvine stock from his servants and agents, Myford Irvine and E. M. Price. Under these circumstances James Irvine, as a matter of law, never parted "with all present and future legal power and dominion over the property", to wit, the Indenture and the Irvine stock.

The principal of law that the delivery of the trust property must be irrevocable is not to be confused with the reservation by the trustor in the trust instrument of a power to revoke the trust after there has been a legal delivery of the trust property. Unless there has been a legal delivery, there is no existing valid trust and it is of no matter or relevancy what the provisions of the trust instrument might be.

Neither of the decisions of the courts below discloses the true evidentiary facts that establish the relationship of master and servant and principal and agent that existed between James Irvine, as the master and principal, and Myford Irvine and E. M. Price, as his servants and agents, that was connected with the delivery of the Indenture and the Irvine stock. These decisions of the courts below are

therefore shockingly wrong and are not supported by the record or the evidence in this case, and they should not be permitted to stand as approved guidelines for future trustors who seek special tax exemption privileges and immunities.

VI

In addition to the reasons stated by the petitioner in her Petition with reference to the importance of the issues involved in the case which support the granting by the Supreme Court of a Writ of Certiorari, the petitioner respectfully submits that, not only for said reasons, but also because there not only is great public interest at stake in this case but further the decisions of the Courts below represent a gross miscarriage of justice, and the result reached by the Courts below is unduly harsh in its impact. Furthermore, the manner in which the appeal of the petitioner was conducted in the Court of Appeals is not only unprecedented but also constituted a denial to the petitioner of due process of law and her right to have her day in court as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution, as well as a denial of procedural due process, and therefore it is proper that this Honorable Court correct the plain error which appears in the record in this case by granting the Petition for a Writ of Certiorari.

Respectfully submitted,

LYNDOL L. YOUNG
Counsel for Petitioner

April, 1969

APPENDIX A

IN THE UNITED STATES DISTRICT COURT CENTRAL DISTRICT OF CALIFORNIA

ATHALIE IRVINE SMITH, *Plaintiff,* *vs.* THE JAMES IRVINE FOUNDATION, a corporation, et al., *Defendants.*	No. 66-1285-JWC Application for Order Joining Parties Defendant (F.R.C.P. Rules 19, 21), Memorandum of Points and Authorities, and Affidavit of Howard J. Privett in Support thereof

Defendant, The James Irvine Foundation, and the individual defendants herein, hereby make application for an order joining as parties defendant in this action Linda Irvine Gaede; Gloria Wood Irvine and Security First National Bank, a national banking corporation, as executors and trustees of the Estate of Myford Irvine, deceased; William Thornton White, Jr., as executor of the Estate of Katharine Brown Irvine, deceased; and the Attorney General of the State of California, and each of them.

This application is made upon the ground that each said proposed party defendant is a proper and necessary or indispensable party to this action and that the joinder of said parties is required to fully and finally resolve the pending controversy and to avoid subjecting those who are already parties herein to a substantial risk of a multiplicity of actions possibly involving inconsistent results.

The proposed new parties, and each of them, can be joined herein as defendants without depriving this court of jurisdiction and each proposed new party is subject to the jurisdiction of this court as to both service of process and venue.

This application is based upon this notice, the affidavit of Howard J. Privett and the memorandum of points and authorities annexed hereto and the records, pleadings and files in this action.

Dated: March 27, 1967.

McCUTCHEN, BLACK, VERLEGER & SHEA
BURNHAM ENERSEN
HOWARD J. PRIVETT
SHELDON A. GEBB

By HOWARD J. PRIVETT
HOWARD J. PRIVETT

Attorneys for Defendants The James Irvine Foundation, et al.

PILLSBURY, MADISON & SUTRO
CHARLES B. RENFREW

By CHARLES B. RENFREW
CHARLES B. RENFREW

Attorneys for Kate L. Wheeler

MEMORANDUM OF POINTS AND AUTHORITIES

The plaintiff has failed to name or join as parties defendant in this action heirs at law of James Irvine, deceased, beneficiaries of the estate of James Irvine, deceased, and the Attorney General of the State of California, each of whose interests are adverse to those of plaintiff and will be affected by any judgment entered herein. The proposed parties defendant are citizens of the State of California, are subject to the jurisdiction of this court and can be made parties defendant herein without depriving the court of jurisdiction. Accordingly, their joinder should be ordered under the provisions of Rule 19 of the Federal Rules of Civil Procedure which provides in relevant part:

> "(a) PERSONS TO BE JOINED IF FEASIBLE.
>
> A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he

be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action."

Where, as here, the plaintiff has failed to join parties who should be before the court in order to fully and finally resolve the pending controversy, the court should order their joinder on its own initiative or on motion of the defendants. Rule 21 of the Federal Rules of Civil Procedure; *Hoffman v. Santly-Joy,* 51 F.Supp. 778 (S.D.N.Y. 1943); Moore's Federal Practice, 2nd Ed. Vol. 3, § 21.05.

The plaintiff brings this action as an heir at law of James Irvine, deceased, and as a beneficiary, devisee and legatee under the will of James Irvine, deceased. Plaintiff's position in the action is in direct conflict with the interests of the other persons who are heirs at law and/or beneficiaries of the estate of James Irvine, deceased. A judgment herein would necessarily affect the rights of said persons and if they are not joined as parties, the persons who are already parties would be subject to a substantial risk of multiplicity of actions involving the same subject matter with possibly inconsistent results. It is therefore necessary and proper that said parties be joined herein as parties defendant. *Bank of California v. Superior Court,* 16 Cal.2d 516, 106 P.2d 879 (1940). The same rule applies in the Federal Courts. *Baird v. Peoples Bank and Trust Co. of Westfield,* 120 F.2d 1001

(3rd Cir. 1941); *Warner v. First National Bank of Minneapolis,* 236 F.2d 853 (8th Cir. 1956), *cert. denied* 352 U.S. 927 (1956).

The Attorney General of the State of California under the provisions of the Uniform Supervision of Trustees for Charitable Purposes Act (California Government Code, sections 12580-12595) is responsible for the regulation and supervision of the charitable trust established by the Indenture of Trust between James Irvine, as trustor, and The James Irvine Foundation, as trustee, dated February 24, 1937. Since the plaintiff seeks in this action to terminate said charitable trust, the Attorney General is an indispensable party to the action. Government Code section 12591 expressly so provides:

> "The Attorney General may institute appropriate proceedings to secure compliance with this article and to invoke the jurisdiction of the court. The powers and duties of the Attorney General provided in this article are in addition to his existing powers and duties. Nothing in this article shall impair or restrict the jurisdiction of any court with respect to any of the matters covered by it, except that *no court shall have jurisdiction to modify or terminate any trust of property for charitable purposes unless the Attorney General is a party to the proceedings.*" (Emphasis added.)

Plaintiff is on record as having no objection to the joinder of the proposed parties defendant who are necessary and indispensable parties to this action, and has acknowledged that their joinder may be ordered without

the necessity of a hearing as appears in the following extract from the Reply of Plaintiff to Answer of All Defendants to Amended Complaint Except the Irvine Company:

> "The plaintiff has heretofore indicated to the court the plaintiff has no objection to the joining in this action of any parties whose interests are involved in said action and may be affected by any judgment entered herein and who appear to the court to be necessary or indispensable parties to this action as provided in Rules 19 and 21 of the Federal Rules of Civil Procedure whenever the court shall determine of its own motion that said parties, whoever they may be, shall be so joined." (Page 16, lines 11-18.)

Under the provisions of Rule 21 of the Federal Rules of Civil Procedure, no formal notice need be given to the proposed new parties of the application for their joinder. *United States v. Bayer Co.*, 105 F.Supp. 955 (S.D.N.Y. 1952). However, as appears from the affidavit of Howard J. Privett, annexed hereto, each of the proposed parties defendant has been furnished with copies of the complaint, amended complaint, answers to the amended complaint and other pleadings on file herein and each has been advised of the making of this application through their respective counsel.

This application is presented ex parte with notice to the other parties to this action for the reason that it is imperative that the proposed new parties be brought into the action before the next scheduled hearings which begin on May 1, 1967. Under the terms of the Order Ruling

on Motions and Order Giving Directions as to Further Proceedings in the case filed herein on February 23, 1967, the parties are permitted to proceed with the taking of depositions by the usual procedure from and after March 20, 1967. The attorneys for the parties have conferred on the matter of a schedule for the taking of the depositions which are not to be taken under judicial supervision and it has been agreed that the depositions will commence on or about April 4, 1967. With the consent of counsel for the plaintiff, the proposed parties defendant have been invited to attend said depositions but an order should be entered herein joining them as parties defendant so that they may participate in said depositions if they be so advised.

DATED: March 27, 1967.

Respectfully submitted,

McCUTCHEN, BLACK, VERLEGER & SHEA
BURNHAM ENERSEN
HOWARD J. PRIVETT
SHELDON A. GEBB

By HOWARD J. PRIVETT
HOWARD J. PRIVETT

Attorneys for Defendants The James Irvine Foundation, et al.

PILLSBURY, MADISON & SUTRO
CHARLES B. RENFREW

By CHARLES B. RENFREW
CHARLES B. RENFREW

Attorneys for Defendant Kate L. Wheeler

AFFIDAVIT OF HOWARD J. PRIVETT

STATE OF CALIFORNIA
} ss.
COUNTY OF LOS ANGELES

HOWARD J. PRIVETT, being first duly sworn, deposes and says:

1. That he is an attorney at law and a member of the firm of McCutchen, Black, Verleger & Shea, and is one of the attorneys for the defendants herein.

2. That the records, pleadings and files herein disclose that Linda Irvine Gaede is an heir at law of James Irvine, deceased, and a beneficiary of the Estate of James Irvine, deceased. Said Linda Irvine Gaede resides at 4541 Brighton Road in the City of Corona Del Mar, County of Orange, State of California, and is represented by the law firm of Latham & Watkins and John P. McLoughlin, Esq., 615 South Flower Street, Los Angeles, California, with respect to the matters involved in this action.

3. The records, pleadings and files herein disclose that Myford Irvine, deceased, was an heir at law of James Irvine, deceased, and a beneficiary of the estate of James Irvine, deceased. Gloria Wood Irvine, the widow of said Myford Irvine, deceased, and the Security Pacific National Bank, a national banking corporation, are the executors and trustees of the estate of Myford Irvine. Gloria Wood Irvine resides at 5 Harbor Island, in the City of Newport Beach, County of Orange, State of California. The Security Pacific National Bank conducts business at 561 South Spring Street, in the City and County of Los

Angeles, State of California. Said executors and trustees are represented with respect to the matters involved in this action by the law firm of Lillick, McHose, Wheat, Adams & Charles and John C. McHose, Esq., 600 South Spring Street, Los Angeles, California.

4. The records, pleadings and files herein disclose that Katharine Brown Irvine, deceased, was an heir at law of James Irvine, deceased, and a beneficiary of the estate of James Irvine, deceased. William Thornton White, Jr., who is a resident of Orinda, California, is the executor of the estate of Katharine Brown Irvine. He is represented by Elden C. Friel, Esq., 1006 Russ Building, San Francisco, California, with respect to the matters involved in this action.

5. Defendant The James Irvine Foundation as trustee of the charitable trust which is the subject of this action is subject to the regulation and supervision of the Attorney General of the State of California with respect to the administration of said trust under the provisions of the Uniform Supervision of Trustees for Charitable Purposes Act (California Government Code, section 12580-12595). The Attorney General has an office at 600 State Building, 217 West First Street, Los Angeles, California.

6. The persons above named, and each of them, have been advised through their respective counsel by affiant that defendants will move this Court for an order requiring their joinder herein as parties defendant and said persons through their said counsel have been furnished with copies of the complaint, amended complaint, answers to the amended complaint and other pleadings in this action.

7. The persons above named, and each of them, through their respective counsel have been advised of and invited to attend the depositions now scheduled to begin herein or or about April 4, 1967, and affiant has been orally advised by plaintiff's counsel, Lyndol L. Young, that plaintiff has no objection to their attendance at said depositions.

HOWARD J. PRIVETT
HOWARD J. PRIVETT

Subscribed and sworn to before me
this 27th day of March, 1967.

BARBARA REED
Notary Public in and for said
County and State

My Commission Expires April 6, 1968